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In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA, ET AL.,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE CITIZENS EQUAL RIGHTS ALLIANCE (CERA) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a treaty provision that gives Indian bands the right to hunt and fish "during the pleasure of the President" created only temporary rights which are extinguished when a state is admitted to the Union on equal footing with the original 13 states.

2. Whether a treaty ceding to the United States "all right, title and interest of whatsoever nature" in previously ceded territory constitutes express abrogation of hunting and fishing rights reserved in a previous treaty under the Supreme Court's holding in *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985).

3. Whether the President acted within the scope of his congressional authority when he revoked the Indians' rights to hunt and fish under a treaty that only guaranteed those rights "during the pleasure of the President of the United States."

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INTEREST OF THE AMICUS CURIAE[1]

The Citizen's Equal Rights Alliance (CERA) is a non-profit association of INTEREST OF THE AMICUS CURIAE.

The Citizen's Equal Rights Alliance (CERA) is a non-profit association of American citizens, incorporated and licensed under the laws of the State of New Mexico and headquartered in Santa Fe, New Mexico. CERA's interest in this lawsuit arises from CERA's advocacy of the principle that all people should be treated equally, whether Indian or non-Indian. In this sense, CERA's interest mirrors that of Petitioners. The Chippewa Bands' position that they are entitled to the reinstatement of treaty rights, voiding the application of state police power authority to regulate hunting, fishing and gathering rights, regulations applicable to all other state citizens, violates the principle of equal rights under law. This amicus brief supports the position of the Petitioner, State of Minnesota, Docket No. 97-1337.

SUMMARY OF THE ARGUMENT

The Amicus Curiae press their argument that the involuntary deprivation of state jurisdiction is unconstitutional, as first outlined in the brief submitted in

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

support of granting the petition for certiorari. That brief challenged the authority of the Courts of the United States to reinstate treaty rights deemed extinguished or terminated for eighty years when doing so deprived a State of its jurisdiction. This brief argues for the application of the constitutional process for federal land acquisition against the process outlined in the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*

The argument primarily analyzes the complications created by the "trust lands" provisions of the IRA as rendered by the Court of Appeals for the Eighth Circuit acting through Judge Murphy. Although the Mille Lacs reservation was terminated, the United States and the Court of Appeals for the Eighth Circuit have continually disassociated treaty rights from the reservation, thereby claiming that wholly defunct treaty rights could reemerge, fully effective whenever the United States places lands back into "trust" status under 25 U.S.C. § 465. Their conclusion relies on the presumption that constitutional authority exists allowing the United States to recreate "territory" in a fully-admitted State of the Union. Further, this conclusion relies on the lesser presumption that this power is delegable to the Secretary of Interior in the Executive Branch and enforceable in the courts of the United States.

Congress, even if it were able to do so, has never acted directly to restore the Mille Lacs reservation. This point should have, but does not, end the discussion, because it begs a question. It seems rudimentary, but uncertain in the law of this Court whether federal jurisdiction is a necessary predicate to Property Clause jurisdiction. In short, whether Congress can restore to an

Indian Tribe now-extinguished usufructuary rights to land over which there has existed State jurisdiction. These lands are no longer in its Property Clause jurisdiction. The only claim to such power must rely on Congress' "ability" to reestablish territorial jurisdiction within the four corners of a State.

This brief will also address the other potential source of authority – the power to establish "Indian country" within a State. Even if, by implication, the Property Clause contains such powers, other clauses of the Constitution question the viability of such a power. Finally, even assuming this power impliedly exists under the Property Clause, and the asserted power does not violate any other clauses of the United States Constitution, the power cannot be delegated to the Executive Branch to exercise.

STATEMENT OF THE CASE

Beginning in 1971, the United States laid siege to the lawful authority of the States of Minnesota and Wisconsin. On behalf of different bands of Chippewa Indians, the United States brought a series of lawsuits designed to reinstate Indian treaty rights deemed extinguished by all parties from the 1890's to 1970. Mille Lacs is the latest in this line of challenges; only the most recent seeking to recreate the hunting, wild rice gathering and fishing rights. So far, the United States has participated in more than six suits in Minnesota and Wisconsin, each of which sought to displace the regulatory powers of those states to administer the hunting, gathering and fishing rights on state and private lands.

As recently observed by this Court, Minnesota is not a public lands state with vast amounts of federal land available for tribal uses, in trust or otherwise. Ultimately, because of Minnesota's special heritage, the term "reservation" is inappropriately attached to the land claimed by the Mille Lacs Band. These lands are property over which State jurisdiction would be divested. The divestiture is accomplished by little more than a strawman purchase by a middleman subsidiary of the federal government. Ultimately, lands entrusted pursuant to 25 U.S.C. § 465 are owned by the United States in trust for the tribe. The transfer of title to the United States on behalf of the tribe is nothing more than an attempt to artificially permit an unconstitutional racial classification.

The means by which this occurs is left unresolved, except its consequences are clear: the State of Minnesota may not regulate. The nature of the federal ownership status of these purchased and donated lands is undefined by either the IRA or the courts. If the trust lands qualify as "Indian country," the lands are not only removed from state taxation, but from state jurisdiction, effectively recreating a reservation of public land from land wholly private. This power was never anticipated by the Framers of the Constitution, and only inserted between the Articles and Clauses upon the finding of an eternal emergency.

The contradiction between the State and the newfound "reservation" of the Mille Lacs Band of the Chippewa Indians is most troubling because Congress has already spoken on this subject. The purchased lands, purported to be restored, are wholly within the original boundaries of the reservation expressly terminated by the

Nelson Act. Nelson Act of 1889, ch. 24, 25 Stat. 642. The United States, in response to the Petitioners, has suggested that the pre-Statehood reservation (though extinguished) leaves an indelible mark on the real property, rendering it forever susceptible to reinstatement of reservation status, regardless of the admission of the State.

This Court, though facing a similar argument just last Term, did not address the federal contentions. In *Cass County, Minnesota v. Leech Lake Band of Chippewa*, this Court addressed the question of evading Congressional processes; holding only that the Congressional process to place the lands into trust status could not be avoided by the Executive Branch. Now, the United States magnifies the demand placed, seeking to merge "restored" treaty powers to its "trust" powers for the Indian tribes. The potential result of allowing strawmen purchases threatens the viability of States, and challenges the People's protection from tyranny.

ARGUMENT

I.

INTRODUCTION

The Mille Lacs decisions of the Eighth Circuit conflict with the decisions of this Court. *Compare South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *with Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 861 F.Supp. 784 (D. Minn. 1994) (Opinion by Judge Murphy now sitting on the Court of Appeals for the Eighth Circuit); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F.Supp.

1118 (D.Minn. 1994) (same). This Court has held that the extinguishment of Indian lands is also an extinguishment of Indian Treaty claims. *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998); *South Dakota v. Bourland*, 508 U.S. 679 (1993). The Nelson Act is the Minnesota version of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, §§ 5 and 6. Further, this Court has recently addressed and applied the plain meaning of the Nelson Act, an interpretation which wholly applies to this case. *See Cass County, Minnesota v. Leech Lake Band of Chippewa*, 118 S.Ct. 1904 (1998). Under the *Leech Lake* analysis, the reservation in its entirety was terminated, thereby terminating all ancillary treaty rights attached to the land. By definition, usufructuary treaty rights are attached to the land, and thus, it follows, were terminated.

Based on a doctrine without basis in common law or history, the federal government has invented long-dead rights under the remarkable doctrine of "trust lands." The only claim that the usufructuary treaty rights still exist is the crude bootstrapping adventure engaged by Judge Murphy. First, the tribe reacquires land since disposed of and then applies to have it placed in trust. Second, the tribe and federal government discover treaty rights that can be remarried to an otherwise divorced plot of land. Finally, based on only a small initial purchase (and entrusting), the tribe reclaims active jurisdiction over all of the land originally within the reservation boundaries, claiming it to be "Indian country." The argument trespasses on logic: it necessarily prepresumes that choate usufructuary treaty rights could survive inchoate for more than 75 years. This asserted power is no more

credible than the Secretary of Interior purporting to reinstate Indian lands within extinguished reservation boundaries; the consequences of which are equally severe.

II.

DISPOSAL OF THE TERRITORIES PROTECTS FEDERALISM; A POWER TO REINSTATE TERRITORIAL LAND STATUS THREATENS FEDERALISM: THIS COURT SHOULD REINSTATE A PROCESS THAT DEMANDS THE FIRST AND PREVENTS THE SECOND.

Congressional power over territorial lands was meant to be temporary. As the Constitution provides, "Congress shall dispose of the Territories . . . " U.S. Const., Art. IV, Sec. 3, Cl. 2. The principle mandating disposal has long been upheld by this Court. *See U.S. v. Midwest Oil*, 236 U.S. 459 (1915); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *U.S. v. Gratiot*, 39 U.S. (14 Pet.) 525 (1840). In other areas, Congress itself recognized the temporary nature of its regulatory authority. *See* Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.* Additionally, this Court recently required specific Congressional action to create permanent reservations in a state. *Alaska v. United States*, 117 S.Ct. 1888 (1997); *see also New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Ct.App. 1992) (affirming in part, and on Property Clause grounds, 783 F.Supp. 633 (D.D.C.1992)).

Congress expressly terminated a number of smaller Chippewa reservations, the Mille Lacs reservation included, with the Nelson Act. *See Cass County, Minnesota v. Leech Lake Band of Chippewa*, 118 S.Ct. 1904, 1907 (1998).

The State of Minnesota accepted jurisdiction and exercised full jurisdiction over formerly Chippewa lands under the Nelson Act until 1971 when, in a case of first impression, a federal district court erroneously divorced Indian title and usufructuary rights. *Leech Lake Band of Chippewa v. Herbst*, 334 F.Supp. 1001 (D.Minn. 1971). The final resolution of the status of a large number of minor reservations in Minnesota came to a screeching halt when a tribe could resist state regulation on seemingly state-jurisdiction lands. The creation of a federal trust for the benefit of the Indians was the illogical leap designed to stymie the private use of private property. In short, through the creation of an otherwise undefined trust, the federal government used its agents to turn private property into public property without first making reparations.

To acquire jurisdiction over the Respondent's claim, sitting as District Judge, Judge Murphy impliedly determined the tribal treaty rights to be "reserved rights." Based on an original jurisdiction decision, the Judge relied on an 1837 Treaty to defeat Eleventh Amendment defenses to an action under 42 U.S.C. § 1983. Judge Murphy mutated choate (but extinguished) treaty rights into inchoate (but lingeringly viable limitations on private title to land within the now-defunct reservation boundaries) "reserved rights" reverting to the federal government. *Mille Lacs Band of Indians v. State of Minn.*, 853 F.Supp. at 1124 (*citing Arizona v. California*, 460 U.S. 605, 613-14 (1983)). A reserved right is not a real property right, but rather a limited right attached to federal lands. The lands at Mille Lacs are allotted and purchased lands placed back into trust status under 25 U.S.C. § 461 and

§ 465. The District Court's "logic" is that the "entrusting" of the land reactivates nascent rights that merged with the unity of title which occurred on the disposal of land. The Treaty rights could not have survived the disestablishment of the reservation under the Nelson Act. But, if the Treaty rights did survive disestablishment they cannot be claimed as reserved rights because the federal land status was still terminated.

The reasoning of *Herbst* is illustrative of the larger problem inherent with "trust" lands: there is no natural limit to its breadth. The law has no natural limits because the power relied upon is not contained in any specific clause of the Constitution. The IRA itself does not state any constitutional authority upon which it relies. The IRA is not limited in its powers against the states, and in fact, by means of § 465, can serve to extinguish a State, inverting the Property Clause one-directional process. Finally, in Sec. 3 of the IRA, the Act purports to delegate to the Secretary of the Interior a power to undispose property. The notion that a citizen could give what he (or she) does not have is made no less preposterous by involving the government rather than the citizen. Once relinquished, federal jurisdiction cannot simply be recaptured from the State.

The United States enacted the IRA in 1934 at the height of the New Deal, amidst a plethora of acts claiming "emergency" authority. Because of the times, economic collapse and threats to pack the Court with sympathetic jurists figuring prominently, it was deemed acceptable to combine Article I and Article II constitutional powers with the Property Clause powers. *See, e.g., Ashwander v. T.V.A.*, 297 U.S. 288 (1936); *Cincinnati Soap v.*

United States, 301 U.S. 308 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). The sense of personal and social emergency weakened the resolve to limit the branches to their separate powers. Acts premised on emergencies were found constitutional. Most of the New Deal was passed as "temporary emergency" provisions with due consideration for the exigencies of the times – the IRA was the product of a different purpose altogether. The IRA was an assertion of a new kind of power, an unlimited trust power to preserve Indian tribal lands. It is this "trust" that makes the Property Clause authority a permanent territorial power.

The Property Clause was only intended to be a temporary power. This is demonstrated by the preceding clause of the Constitution, the Statehood Clause. U.S. Const., Art. IV, Sec. 3, Cl. 1. Congress is required to make States from territories. The Framers only viewed the Northwest Territory, of which Minnesota was a part, as the area into which the United States would expand. The Northwest Ordinance of 1787, passed under the Articles of Confederation, established the then-applicable rules for admission as states and the protection of the rights of the People of the Northwest Territory. The Northwest Ordinance also expressly protected the rights of the Indian tribes. It also prohibited slavery in the Northwest Territory. Ultimately, the Northwest Ordinance constitutes Congressional cognizance of this temporary power in the federal government.

The Chippewa Bands of Minnesota and Wisconsin have argued that the Northwest Ordinance still protects their rights in this case. The Eighth Circuit agreed, stating that the Northwest Ordinance of 1787 was still in effect.

Both the Chippewa and the Court of Appeals for the Eighth Circuits ignore the fact that the Northwest Ordinance was held to be without legal effect by this Court. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1857). Because of the Court's intent to preserve the institution of slavery, *Scott* deliberately mutated the Property Clause. Chief Justice Taney's invention was necessary because the Framers intended to abolish slavery as an institution and constructed a structure to ensure that result. Ultimately, Chief Justice Taney confronted and supplemented the constitutional process for disposal of federal property and the individual rights within the territories. *Scott*, 60 U.S. at 432.

The pre-*Scott* and post-*Scott* Property Clauses construct two different Property Clause processes. The first process was designed by the Framers. The second works to preserve slavery. In a seemingly well-intentioned effort, the Court of Appeals for the Eighth Circuit has applied both processes and given the Chippewa the benefit of both. Ultimately, the Judge Murphy revisionist history gives the tribes access to Court without strictly applying the Constitution in full. A government not accountable to its charter is government within which the judicial has merged with the executory. *See generally Clinton v. City of New York*, 118 S.Ct. 2091 (1998).

The pre-*Scott* Property Clause process mandates a one-directional transfer of property. The very restrictive process forces the creation of states from territory. U.S. Const., Art. IV, Sec. 3, Cl. 1. Further, the process guarantees a republican form of government to exist in the new states. U.S. Const., Art. IV, Sec. 4. It specifically distinguishes between states and territories to prevent the use

of territorial powers in the sovereign states. Once a State exists, the United States can only acquire real property within the State with state approval. *See* U.S. Const., Art. I, Sec. 8, Cl. 17; *see also American and Ocean Insurance Companies v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

The post-*Scott* Property Clause process limits the Northwest Ordinance to the Northwest Territories, and thereby carefully evades the original intent of the Constitution. *Scott*, 60 U.S. at 432-53. This very carefully drafted rhetoric twists history to its purpose while disposing of all limitations on the power to acquire territory. *Id.* at 441-43. By applying the processes incompletely, the Eighth Circuit has improperly allowed the acquisition of territory to be "discretionary" in the Congress and delegable to the Executive. *Id.* at 449. This rationale created a new power not specifically contained anywhere in the Constitution, and a process seemingly without limitation.

All three questions presented in this appeal flow from the creation of this "discretionary" unlimited power. To understand the full perversion of the proper constitutional process by Chief Justice Taney, one must examine the Framers process for the acquisition of territory and its administration. In 1828, Chief Justice Marshall had opportunity to describe the Framers' original intent for the Property Clause. *See generally, American and Ocean Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511. The *Canter* Court explained the property acquisition process: acquiring territory by conquest or treaty; creating the territory; and admitting it as a state of the union. The Court finds that, in territories, the Congress is exercising the powers of both the national and state governments. Further, that the act of granting statehood formally separates these

powers. Of course, in exercising the combined powers prior to Statehood, the Congress would be limited to only those acts compliant with the remainder of the Constitution.

The post-*Scott* process destroys the necessary distinction between the war powers used to acquire property and the territorial power used in managing it. *See Canter*, 26 U.S. at 540. The post-*Scott* process allows the Congress to act in response to any perceived "emergency" and to do so forever. In contrast, the pre-*Scott* process uses the full Constitution to separate the powers of the state and general government carefully keeping the war powers confined to the acquisition of territory stage. As described by the *Canter* Court, the execution of the treaty of peace or cession is a formative event. The execution of such treaties brings the territory under the jurisdiction of the Constitution, ending the use of the actual war powers. The domestic recognition of this ending is when the territory receives its Organic Act from the Congress. However, because the Organic Act combines both national and state powers, it does not end the territorial power over the land.

By converting the acquisition of territory into a discretionary authority, *Scott* allows the full operation of territorial war powers in a state. Because there is no basis for this discretionary authority, the Constitution seems to contain no structural limits to the doctrine's effect. In fact, the only limit remaining is the principle that the territory acquired must be held in trust for all citizens on an equal footing with all other citizens. The creation of this limited "equal footing" trust proposed to replace the structural limitations of the pre-*Scott* Property Clause

process. Ultimately, Justice Nelson's prescient analysis has proven correct. *Scott*, 60 U.S. at 463-65. For all practical purposes, the IRA has recreated slavery within States by relying on a discretionary territorial war power to acquire property.

The IRA trust land provisions all contain one thing in common: they convert tribal title into federal. When the United States acts to shift title from the tribes to the general government, the United States exercises the Property Clause. To do so, the federal government must first expand the much-misunderstood term "domestic dependent nation." The common misperception is that "domestic dependent nation" is a status that exists independent of territorial jurisdiction. The misperception principally derives from not reading the three early Property Clause opinions in conjunction. *See Cherokee Nation v. Georgia*, 31 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Canter*, 28 U.S. 511. For the three opinions to be consistent, the Court must have meant that the Indian tribes have ceded all of their territorial jurisdiction short of the right of occupancy to the United States. If this is the case, the residuum of sovereignty remaining to the tribes exists at the discretion of Congress. The determination of when to dispose of the land would end the separate status of the Indian Tribes.

Further, for the tribe to retain any residual sovereign authority, the United States must preserve the territorial land status of the lands. This understanding of *Cherokee Nation* and *Worcester* is most crucial, because the discretion to eternally retain the territorial status was plainly limited by the *Canter* holding. By reading *Cherokee Nation* and *Worcester* in conjunction with *Canter*, Congress did

not create tribal sovereignty, but rather allowed it to remain until the territory became a State. Applying this understanding to the matter presently before this Court, when the lands were disposed at Mille Lacs under the Nelson Act, the inherent tribal sovereignty of this Chippewa Band was terminated and their residual treaty interests extinguished.

The IRA does not depend on the pre-*Scott* Property Clause process, but rather the post-*Scott* affirmative power. The IRA works to extend Indian sovereignty and the associated federal authority beyond the boundaries of territorial status land and against the lawfully created States. As justification for the creation of the racially-classified trust, the IRA relies on a declaration that creating the trust is in the public interest. The distinction between the public interest and the private interest is one not drawn by the IRA. The irony is that the IRA, enacted after the Civil War, indirectly relies on pre-Civil War precedent as authority for evading judicial review.

The Taney Court could not merely create an alternative Property Clause process; it needed to prevent Article III courts from challenging the propriety of the new process. The Supreme Court relied on a distinction between enforcement of private and public rights in Article III courts to set the foundation for *Scott*'s process. Only one year before *Scott*, in *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1856), the Supreme Court drew this distinction. The Court held that

> "a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be

> made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent."

Murray's Lessee et al. v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 283 (1856). *Scott* uses this enhanced definition of jurisdiction over property to require the Congress to allow the taking of slaves as private property into a territory. *Scott*, 60 U.S. at 451. The IRA mirrors this now-defunct theory of absolute immunity: it uses the public agent, namely the Secretary of Interior, to acquire public property; the lands are taken in the title of the United States in the public interest, preventing judicial review of the IRA and its assumed powers including a newly created form of tribal sovereignty.

As the foundation to its use of the condemnation power at the outbreak of the Civil War, the Lincoln Administration appropriated slaves to end the institution of slavery. *See generally* War Powers by William Whiting (43 ed.), Preface and Chapter 1. The condemnation power served as an active war power and relied on the *Murray's Lessee* distinction coupled with the post-*Scott* discretionary trust. The Lincoln condemnation efforts relied extensively on the General Welfare Clause and ultimately served to institutionalize the connection between the war powers and the General Welfare Clause. Therefore, any declaration of emergency leading to reactivation of the war powers allows the power assumed in the IRA to reconstitute beyond judicial review. Ultimately, by doing so, it renders the national government completely unaccountable for any use of this power.

The public interest of the highest order is the preservation of the Constitution itself. The most efficacious tool

for ensuring the lasting viability of the Constitution is its application in its entirety. By creating specific political processes which make the government accountable to the people as a whole, the preservation is assured because the individual rights and freedoms, privileges and immunities are equally guaranteed. "Emergency" acts like the IRA, purporting to outlast the federal interest in territorial land status avoid the original Property Clause process of disposing of territories, creating states, purchasing federal enclaves and guaranteeing republican government. This process was designed to protect the federalism concept because in carefully compartmentalizing divided powers, individual rights would not be unduly trampled even when an emergency arose.

In one sweeping act, the IRA dispensed with this concept and the safeguards were thrown out; a new kind of national interest was declared to remedy past wrongs to specific groups. The end of frontier settlement converted the "civilizing" drive westward into a federalization of domestic law. Rather than provide for the equality of rights for all, the IRA purported to expiate collective guilt by retaining racist classifications. In more recent years, the expiation of national guilt included the discovery of federal interests in land, water, air, noise and the use of these newfound interests to negatively impact private rights. On May 14, 1998, President Clinton continued this effort to expiate guilt by Executive fiat, demonstrating the virtually unlimited ability to eradicate constitutional safeguards by the creation of an affirmative Indian trust power. E.O. 13, 083; E.O. 13, 084.

It is important to note that the Secretary of Interior is not acting in a fiduciary capacity in placing lands into

trust under the IRA any more than the President is using these new Executive Orders for the benefit of the tribes. The Secretary is acting as a public agent executing the precept of Congress which is the IRA and is not accountable to the tribes in any capacity. The Secretary is protected by the fullest war powers sovereign immunity. The IRA while calling the lands "trust" lands is actually just recreating territorial land status in a state without constitutional authority. If Congress amended or repealed the IRA, what is the legal recourse of the Indian tribes? If the lands are acquired under the Property Clause, the Indian tribes have no recourse whatsoever. The Indian tribes just serve as the political justification for allowing this dangerous power to be asserted. If the Court strikes down the IRA trust lands provisions as not being an enumerated power to restore lands to territorial status in a state, the court can order the lands purchased by the tribes restored to the tribes in fee simple with compensation because the government had no authority to "take title" to private property and convert it to public use without just compensation.

This assertion of the creation of a power which has no authority under the Constitution is no different than the creation of the line-item veto act by Congress. *Clinton v. City of New York*, 118 S.Ct. 2091. The limitations placed upon the Spending Clause by the political accountability test challenge this assertion of power. *Printz v. United States*, 117 S.Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992). The Court need defer to Congress no longer in determining a limit to recreating territory and thereby extending Indian country. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700 (1998). The only

difference between the Line Item Veto Act and the IRA is the age of the Acts: the veto act was new; the IRA is over 60 years old.

Further counseling against deference to an unidentified Congressional power is the multiplicity of Congressional efforts to sever its responsibility for the actions of Indian tribes. In 1968, Congress passed the Indian Self-Determination and Indian Civil Rights Acts. Both create suspect classifications by setting a racial group apart. *See* Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.*; Indian Civil Rights Act, 25 U.S.C. § 1301-03; *compare Adarand Constructors v. Pena*, 115 S.Ct. 2097, 2113 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). This Court should carefully consider the actions of Congress in light of its unavoidable Constitutional obligations and limitations. A direct application of these limitations requires demonstration of more than collective guilt for the federal actions to remain permissible. *Adarand*, 115 S.Ct. at 2113.

This Court, before adopting the accountability test, dealt a significant blow to the constitutionality of the IRA. *See Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1981). By reasserting Article III separation of powers, and reinstating *Canter* as the proper process of the Property Clause, the Court disrupted the analysis of Chief Justice Taney and William Whiting. The concurring opinion of Justices Rehnquist and O'Connor actually questioned the doctrine distinguishing between private and public rights. *Northern Pipeline*, 458 U.S. at 89. This analysis holds Congress and the Executive accountable

for this disastrous policy which has taken advantage of the Indian people and which stands at the brink of destroying federalism.

III.

ALL NATIONAL PUBLIC INTERESTS FLOW FROM, AND ARE DEFINED BY, THE CONSTITUTION AND ITS AMENDMENTS.

The post-*Scott* Property Clause process allowed the national government to engage in a logical fallacy. The Roosevelt New Deal inverted the premise of a national interest contingent on a national emergency with the presumption that certain emergencies have no date after which the emergency passes. By inverting the contingency of the national interest, the Roosevelt administrations created an emergency by finding a national trust needful of formation. Thus, by engaging in circular reasoning, as long as the administrations could discern a need for a trust, they could find an emergency, and thus leave the matter unreviewable in the post-*Scott* paradigm.

Within a Constitutional structure with national interests separate from policy interests, the structure mandates a heirarchy of national interests. These interests are, by definition, those that could not be achieved on a local level. The heirarchy must first start with structural preservations. Therefore, the foremost inquiry is whether a national action is consistent with that preeminent national interest. As recently observed by this Court, vigilant judicial review safeguards the Constitutional

structure and thereby provides protection to the individual rights. *Clinton v. New York*, 118 S.Ct. 2091 (Kennedy, concurring).

The national government expanded in the late 1890's to the idea of creating social programs to service the general welfare. The authority to create social programs exists under the General Welfare/Spending Clause. The acts creating the social programs are subject to judicial review to ensure that the structure of the Constitution and the rights of the People under the Amendments are not infringed. A trust declared to be in the national interest by act of Congress or Executive Order is subject to judicial review. The judicial review authority is in the evaluation of whether the act is within the limited enumerated powers as defined by the Constitution and its Amendments. It is irrelevant to this constitutional analysis how great the public interest is supposed to be.

The equal footing doctrine was the post-*Scott* surrogate for *Canter*-style structural protection of the Constitution. The equal footing doctrine remains flawed and almost inapplicable in the modern era because it does not reflect the Civil War Amendments. Protecting states' rights is a far simpler standard for Congress to meet than protecting each individual's right to equal protection as required by the Fourteenth Amendment. Admitting states on an equal footing allows far more discretion in the Congress than requiring the equal protection of all citizens in the territory of the United States. Since two Property Clause processes have been running simultaneously, it was impossible to apply the Civil War Amendment standards without confronting the dual system.

This Court has known of the inconsistent processes for many years. The most evident demonstration of that is in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). *DeCoteau* presented the Court with an opportunity to apply the post-*Scott* Property Clause process used in *Arizona v. California*, 373 U.S. 596 (1963). The purpose of the invitation was to allow the restoration of "Indian country" jurisdiction after the disestablishment of the reservation. This Court wisely declined to do so. The *DeCoteau* Court impliedly reinstated the pre-*Scott* process, but did so without supplanting the post-*Scott* process. After *DeCoteau*, the Supreme Court reinforced the extinguishment line of cases with *Montana v. United States*, which adhered to the *Canter* model. *Montana v. United States*, 450 U.S. 544 (1981). *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, follows this line and stands in sharp contrast to the Eighth Circuit ruling in this case. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). Shortly thereafter, the Supreme Court reinforced the post-*Scott* process line of cases with *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

Finally, after over a decade of legal imprecision, the Supreme Court of the United States determined that a dominant analysis needed to be chosen. *See generally A-1 Contractors v. Strate*, 117 S.Ct. 930 (1997). The *A-1 Contractors* Court recognized that two different case line analyses existed and chose the dominant one, but without assaying reconciliation of the two. *Id.* at 934-940. The Court chose to make *Montana*'s reasoning the dominant consideration when comparing state and tribal jurisdiction over non-Indians. *Id.* at 936. The *A-1 Contractors* opinion noted

the difference between the case lines but assumed that the two processes can be reconciled. *Id.* at 939.

After *A-1 Contractors*, but before last Term's cases, the Eighth Circuit seized on the murkiness in the law to continue its attack on Minnesota jurisdiction. The Eighth Circuit relied on the distinction between public interest treaty rights (or reserved rights) and the mere local loss of state regulatory jurisdiction of private rights to press home the attack. Until the premise of national interests in benefitting specific racial categories (at the expense of their individual Constitutional rights) is finally dispensed with, the Secretary of the Interior and judges like Diana Murphy will continue to deny individual rights within and without reservations.

The most recent Term's cases makes clear the structural threats implicit in two simultaneous Property Clause processes. *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998); *Alaska v. Native Village of Venetie*, 118 S.Ct. 948 (1998); *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700 (1998). Despite the limiting of the definition of Indian country and reaffirming the disestablishment cases, this Court declined to limit the sovereign immunity of the Kiowa tribe on off reservation activities. Instead, the Court deferred to Congress. Rather than apply the terms of the Constitution and the pre-*Scott* process to protect citizens of the United States from tyrannical government, the Supreme Court of the United States acquiesced in the denial of the equal protection of the laws.

As the *Kiowa* dissent pointed out, it was appropriate for the Court to impose a limit on tribal sovereign

immunity to on reservation activities. *Id.* at 1707. The effort to allow Congress to clarify its Indian policy on tribal sovereign immunity, demonstrates the fear of the Supreme Court of the United States in having another opinion to protect individual rights overturned by legislation. Until this Court limits the power of Congress to legislate for the Indian tribes "in the public interest" it will not be able to enforce its Art. III responsibilites to protect the People. By not formally addressing the racially-discriminatory "public trust" problem created by the IRA, this Court leaves Congress free to preemptively alter the Court's rule. *See, e.g., Duro v. Reina*, 495 U.S. 676 (1990).

Until this Court defines the process – in favor of slavery or against it – to be applied, the Legislative and Judicial Branches will remain mired in a separation of powers debate. The Indian policy of the IRA is based on preserving slavery as rationalized in *Scott v. Sandford*. *See Elk v. Wilkins*, 112 U.S. 94 (1887). To preserve the rights of the People, this Court must adhere to Chief Justice Marshall's Property Clause process. *American and Ocean Insurance Companies v. Canter*, 26 U.S. (1 Pet.) 511. Once freed of the post-*Scott* shackles, Congressional Acts premised on Article I powers become subject to the Constitution's plain terms. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097. *Adarand* applied to the IRA leaves Sections 3 and 5 unconstitutionally race-based, thus preventing private lands owned by individual Indians and Indian tribes from being transferred to the United States to reinstate territorial land status to remove state jurisdiction.

The IRA creates a racial classification. As declared by the IRA, it is declared to be in the national interest to

keep the Indian tribes separate and distinct from all other people of the United States. In exchange for providing discretionary entitlements, the IRA denudes Indians of their Constitutional rights as established by the Naturalization Act of 1924, 8 U.S.C. § 1401. Though there may be a policy favoring creating classes of citizens, there is no national welfare gleaned from the bitter harvest: the Civil War was fought to prevent the establishment of such a discriminatory national policy.

To the extent that the entitlement to federal monies represents legislation for welfare, the IRA initiates a system which does so premised on racial classifications. Only someone who qualifies as a Native American is eligible for receipt of any of these monies for land acquisitions. The only cognizable difference between the IRA-based treatment of Indians and slavery is that the agent of discrimination wears a federal, not state, badge of authority. As this Court has recently had opportunity to emphasize, the State and National governments both must offer the equal protection of laws to all citizens, and racial classifications will be evaluated under the most restrictive standards. *Adarand Constructors*, 115 S.Ct. at 2113.

The logic behind affirmative action programs is the same as that behind the creation of permanent trusts for the benefit of racial groups. Just as affirmative action programs are susceptible to *Adarand*-based challenges, so must "national interest" trusts like that contained in the IRA. The IRA's assertion of an overriding public interest to justify its reverse discriminatory effect against the majority of the people is affirmative action at its most

dangerous. Such a program can "protect" the People out of their Constitutional rights.

After the passage of the IRA and the host of Roosevelt New Deal "temporary" emergency acts, a number of predecessor trusts were converted from practical enclaves to federal "property." Once converted, the argument ran, the authority to regulate shifted from Enclave Clause precedent to the post-*Scott* Property Clause power. By shifting the land from an agreed-upon purpose for which the State and National government bargained, the federal interest transformed into an eternal trust. Once identified, the trust created a permanent emergency, barring appropriate judicial review. Restoring the premise of this transformation to the pre-*Scott* process leaves the jurisdiction over the land clarified and the public purpose assured. This jurisdictional clarification is wholly consistent with this Court's recent effort in *A-1 Contractors*.

CONCLUSION

From 1971 to date, the United States has nibbled away at the rights of Minnesota and Wisconsin citizens. From 1934 to date, the United States has devoured the rights of citizens in Western states. By converting the nature of real property to "trust" land; by depriving Indian tribes of their ownership of land; by converting the jurisdiction of the State to the jurisdiction of tyranny – in such little nibbles have Constitutional safeguards been broken down. With such small exchanges have the rights of free people been converted into transitory entitlements.

Inviolable rights have been deprived, and it is this Court's duty to restore them. Only by making all people equal under the Constitution can a legacy of abuse and neglect be redeemed, and only by restoring the pre-*Scott* Property Clause process can this be achieved. Only by holding the Government accountable to its charter and to its constituents can all citizens of this Union be free of relentless encroachment by a federal government with limitless appetite.

Respectfully submitted,

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